

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the)	NO. 63235-3-I
Personal Restraint Petition of)	
)	DIVISION ONE
GAIL MARIUS GABRIEL,)	
)	UNPUBLISHED OPINION
Petitioner.)	
)	FILED: July 12, 2010

Leach, A.C.J. — For a second time Gail Gabriel collaterally challenges two of his 1999 convictions of rape of a child in the second degree. Because this court has no jurisdiction to consider the merits of this successive challenge and Gabriel raises a colorable issue of just cause, we transfer this case to the Supreme Court for consideration of this personal restraint petition (PRP).

In October of 1999, a jury convicted Gail Gabriel of one count of rape of a child in the first degree and for three counts of rape of a child in the second degree. On direct appeal, in an unpublished opinion, this court found that there was sufficient evidence to convict him on all four charges. Our Supreme Court denied review, and mandate issued on April 11, 2002. Gabriel has filed five previous personal restraint petitions. He concedes that the petition he filed in 2004 raised the same grounds as his current petition. We dismissed his 2004 petition, and our Supreme Court denied review of this dismissal. He contends that just cause exists for his current petition

because our decision to dismiss his 2004 petition was “external” to Mr. Gabriel and therefore not his fault.¹

RCW 10.73.140 divests this court, but not the Supreme Court, of subject matter jurisdiction to decide a PRP that raises the “same grounds for review” as an earlier petition, although we retain jurisdiction to decide our jurisdiction.² This statute provides,

If a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition. Upon receipt of a personal restraint petition, the court of appeals shall review the petition and determine whether the person has previously filed a petition or petitions and if so, compare them. If upon review, the court of appeals finds that the petitioner has previously raised the same grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

RAP 16.4(d) provides a good cause exception to this successive petition prohibition. This rule states,

The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances and if such relief may be granted under RCW 10.73.090, .100, and .130. No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown.

While we retain the authority to dismiss a successive petition under RAP 16.4(d), we have no authority to decide that good cause exists for a successive

¹ See Reply Br. of Pet'r at 5.

² In re Pers. Restraint of Johnson, 131 Wn.2d 558, 565-66, 933 P.2d 1019 (1997).

petition.³ Consistent with RCW 2.06.030⁴ the parties agree that if Gabriel's current petition raises "the same grounds for review" as his 2004 petition, the appropriate procedure is to transfer this case to the Supreme Court for consideration. We agree.

Now, therefore, it is hereby

ORDERED that the personal restraint petition is transferred to the Washington Supreme Court for final determination.

Leach, a.c.j.

WE CONCUR:

Schneider, J.

Appelwick, J.

³ In re Pers. Restraint of Perkins, 143 Wn.2d 261, 265-66, 19 P.3d 1027 (2001) (observing that a "good cause" determination is not required before transferring a successive petition to the Supreme Court).

⁴ This statute provides, "No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court."